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No. 03-1250

Supreme Court, U.S.
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In The
Supreme Court of the United States

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, FRANK TIBERIO, d/b/a FAIRFIELD TOWING, LAFOND EXPRESS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, MID-CON FREIGHT SYSTEMS, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., ECONOMY TRANSPORT, INC., MASON & DIXON LINES, INC., ROMEO EXPEDITORS, INC., WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., GERRIG'S TRUCKING & LEASING, INC. and BESTWAY EXPRESS, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN DEPARTMENT OF TREASURY, MICHIGAN DEPARTMENT OF COMMERCE, AND THE STATE OF MICHIGAN,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS

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PETITIONERS' REPLY TO BRIEF OF RESPONDENTS

A. Petitioners Presented The Issue To The Michigan Court Of Appeals That Section 601 Preempted The Intrastate Fee Provisions Of The Michigan Motor Carrier Act.

The State of Michigan Respondents argue in their Brief in Opposition to this Petition for a Writ of Certiorari that the Supreme Court should not grant a review on the intrastate preemption issue, as they did not present that issue to the Michigan Court of Appeals. Yet, Petitioners' Brief, appended to the Brief in Opposition, makes evident that Petitioners did present the issue to the Michigan Court of Appeals. Particularly, Petitioners noted:

> Further, a $100 fee imposed annually on each vehicle used by a motor carrier engaged in the intrastate transportation of property cannot help but be 'related to a price, route, or service' of the motor carrier. As such, the Intrastate Decal Fee should have been captured by the preemptive net of Section 601.

(Respondents' App., 13b). Petitioners further stated:

> Indeed, the Intrastate Decal Fee stands as a direct roadblock to a motor carrier's very livelihood – the operation of its vehicles upon the highways of the state – and its continued assessment thus prompts the following question: If Congress intended to make entry into intrastate transportation markets easier by enacting Section 601, how can it be said that such a goal has been accomplished if motor carriers must still pay the *exact same* per-vehicle fee they paid before Section 601 went into effect? The answer to that question is apparent: It *cannot* be said that Congress's intent

> has been carried out because the MPSC has not dismantled the onerous financial barricade erected long before enactment of Section 601, and thus the *exact same* roadblock 'having a connection with or reference to' motor carrier prices, routes, and services continues to block Appellants' movement in the intrastate transportation market.

(Emphasis in original). (Respondents' App., 15b-16b).

In their Brief to the Michigan Court of Appeals, Petitioners called that tribunal's attention to the desire of Congress to enact "the broad preemptive interpretation" set forth in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), a decision that interpreted the virtually identical preemptive language of the Airline Deregulation Act of 1978, Pub. L. No. 95-405, 92 Stat. 1707 (1978). (Respondents' App., p. 9b-10b). They further underscored that the intrastate decal fees in this case were similar to those struck down in *Federal Express Corporation v. California Public Utilities Commission*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979, 112 S.Ct. 2956, 119 L.Ed.2d 578 (1992), *on remand*, 1993 WL 399380 (N.D. Cal. 1993) (unpublished). (Respondents' App., 11b, 17b-18b). The exact language employed by the Congressional conferees was quoted for the Court of Appeals by Petitioners (Respondents' App., 9b, 17b).

Petitioners, then, did directly raise the Section 601 preemption issue before the Michigan Court of Appeals as an examination of their Brief indicates. This issue was preserved. The decision of the Michigan Court of Appeals to ignore these arguments (and wrongfully to conclude that the issue was not contested before it), a decision

which protected a continued stream of state fee revenue, deserves review by this Court, as that decision leaves in place a substantial burden on interstate commerce that Congress intended to remove through the enactment of Section 601.

B. The Challenged Intrastate Decal Fees Are Regulatory Fees, Not State Taxes.

Respondents allege at Page 21 of their Brief that the decal fees are protected, not from any language which occurs in Section 601 itself, but rather from a statement in the House Conference Report that:

> . . . nothing in this amendment is intended to change the application of state tax laws to motor carriers.

(House Conference Report, 103-677, p. 85, reprinted in 1994 USCCAN 1757, Petitioners' App., 85). However, Respondents ignore that Petitioners have challenged not a tax but "an annual **FEE** of $100 for each self-propelled motor vehicle operated by or on behalf of the motor carrier." MCL 478.2(1). (Petitioners' App., 103). (Emphasis supplied). This fee is assessed "for the administration of the Act." *Id.* It is not a tax. The Michigan Court of Appeals in fact analyzed whether this charge was "a permissible fee or an illegal tax." *Westlake Transportation, Inc. v. Michigan Public Service Commission*, 255 Mich.App. 589, 611, 662 N.W.2d 784 (2003) (Petitioners' App., 24). The court there concluded that " . . . we believe the exactions are most properly classified as ***regulatory fees***." *Id.* at 616. (Petitioners' App., 28). (Emphasis supplied). These economic regulatory fees, designed as they were to support a complicated economic regulatory structure for the Michigan intrastate motor carrier industry, have never been held to

be taxes and their continued validity is not protected by language in the Conference Report concerning state taxes for motor carriers.

C. Because Of The Onerous Intrastate Decal Fees, Michigan Never Leveled The Playing Field For Air And Ground Carriers, Thereby Thwarting The Congressional Intent Behind Section 601.

Respondents' Brief in Opposition ignores Petitioners' unassailable statement that Michigan, through continued imposition of this economic regulatory fee, has continued the uneven treatment for air and ground carriers that led to the passage of Section 601 in the first instance. This affront to Congressional purpose deserves attention from this Court.

Respondents allege that the Michigan Motor Carrier Act, MCL 475.1, *et seq.*, has "the dual purpose" of economic and safety regulation. In fact, safety was only a small component of the singular purpose of the MMCA, economic regulation, as Petitioners have pointed out in their Petition. All of those regulatory fees collected by Michigan, now in the tens of millions of dollars since Section 601 took effect on January 1, 1995, were designed to pay for a complicated system of economic regulation of which safety, once again, was merely a small component. However, the regulatory fees, as the court recognized in *Federal Express*, *supra*, were and are a significant burden on interstate commerce in and of themselves. The continued imposition of such fees on carriers such as United Parcel Service (a class member), while Federal Express and other similarly classified air carriers escape such fees, burdens interstate commerce just as did the regulation of price, routes, and service which the fees were designed to

support. Respondents even give lip service at Page 23 of their Brief in Opposition to the creation of a level playing field, while ignoring the fact that Respondents have not done so, by continuing to inflict this economic fee burden on ground carriers. The fee is an integral part of the economic regulation formerly imposed by Michigan. The fee should fall with the economic regulation. This issue is worthy of this Court's review.

D. The Residual Safety Regulatory Authority Of Michigan Is Over Vehicles, Not Carriers.

The limited safety authority left to Michigan as a result of the federal preemption is over motor vehicles, not carriers. Respondents argue that "this Court and Congress interchangeably used the phrase motor carriers and motor vehicles." (Respondents' Brief in Opposition, p. 31). Accordingly, in Respondents' view, it is permissible for states to continue to exercise safety authority over motor carriers and impose this regulatory fee on them, despite the language of Section 601. However, the ICC Termination Act of 1995, Pub. L. No. 104-88 (December 29, 1995), which contains Section 601, defines "motor vehicle" at 49 U.S.C. § 13102(14) as "a vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used on a highway in transportation" while defining "motor carrier" at 49 U.S.C. § 13102(12) as "a person providing motor vehicle transportation for compensation." They are not the same. They are not used interchangeably. States may still regulate the safe operation of vehicles, including size or weight, hazardous materials and highway route controls, and, in the case of *motor carriers*, insurance requirements. However, the entities providing the transportation for compensation, the motor carriers

themselves, cannot be regulated in other respects. The fee falls on this ground, also.

E. Petitioners Presented Evidence Below In Opposition To Respondents' Motion For Summary Disposition, Which Evidence Was Ignored By The Lower Courts.

Respondents claim that Petitioners presented no evidence in opposition to the State's Motion for Summary Disposition below. Respondents have obviously overlooked large portions of the record, just as they overlook the fact that these challenged fees continue to preserve a bi-level playing field. Particularly, Petitioners submitted affidavits from Mickey Blashfield, Director of Governmental Relations of 11 of the named Plaintiffs (which group paid fees in excess of $50,000 annually), and John A. James, the long-time President (for 25 years) of another three of the named Plaintiffs (which group paid fees in excess of $20,000 annually), as well as one report from the State of Michigan Senate Fiscal Agency on motor carrier revenues and expenses and another report entitled *Truck Safety and Economic Regulation of the Trucking Industry* authored by the Michigan Department of Commerce Office of Policy and Legislative Affairs (November 1992), in addition to the state-by-state intrastate fees comparison prepared by the American Trucking Associations, Inc. (Petitioners' App., 105-110). That fee comparison was later updated to the Michigan Court of Claims revealing that West Virginia, the only state which had exceeded Michigan's fee level, had dropped its fees to $3.00 per vehicle per year. There was evidence of record then which directly contradicted those arguments posited in the Respondents' Motion, although the Court of Claims ignored such evidence so

that this state's revenue stream would be protected despite the federal preemption.

CONCLUSION

Millions of dollars in fees continue to be assessed under a state economic regulatory statute from the 1930's, even though Congress preempted these economic regulatory statutes effective January 1, 1995. This matter can be rectified only if this Court grants this Petition for Writ of Certiorari.

Respectfully submitted,

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